No. 80-1513

In the Supreme Court of the United States

OCTOBER TERM, 1980

HERMAN BLUM CONSULTING ENGINEERS, INC.
Petitioner,

v.

CARL M. HADRA
Respondent.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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STATEMENT OF THE CASE

Aside from editorialization, the Petitioner's "Statement of The Case" is substantially factually correct, with the exception of the statement on page 6 of the Petition, that "The first trial was lengthy, complex, and contentious." The trial was neither lengthy (the totality of the trial took three and one-half days with several delays caused by an unusual snow storm in Dallas, Tr.82,350),* nor was it complex. The issues submitted to the jury in an interrogatory verdict were clearly delineated and succinctly stated, with the exception of the instructions with reference to mitigation of damages. (Tr.611-629) The trial was no more contentious than that of any other jury trial at

*The Respondent adopts the Record and Transcript References used by Petitioner.

which the determination of issues of fact are disputed.

The issue submitted to the jury vis-a-vis the ending date of the contract was resolved in favor of the position of Blum, i.e., it was terminated when the Shiraz contract ended. (Answer to Interrogatory No. 4, Tr.633) There was no contention that Blum had not terminated Hadra, as this was done by the letter in evidence terminating Hadra's services in Iran and leaving him in Iran with no transportation back to the United States and revoking all of Hadra's company credit cards (Plaintiff's Exhibit 21, Tr.305-306) The only issues submitted to the jury on the contract were: Did Blum re-assign Hadra to Dallas? (Interrogatory No. 2), which the jury answered: Blum did not re-assign Hadra to Dallas (Tr.633), and whether Hadra satisfactorily performed his obligations and duties under his contract with Blum, which the jury answered in the affirmative (Answer to Interrogatory No. 3, Tr.633).

The only issue on which the jury was confused was on Hadra's duty to mitigate, if any, and the amount that he could have mitigated, if any. The other issues which originally had been involved in the lawsuit were resolved by the court and never submitted to the jury. (Tr.609)

Unfortunately the instructions of the court on mitigation of damages were not as complete as perhaps they should have been. (Tr.610-611) This was corrected by expanded instructions as to the burden of proof and the necessary elements of proof of mitigation under the Texas law in the second trial (II, 244-247).

REASONS FOR DENYING THE WRIT

Blum does not challenge the constitutional power of the trial court to grant a new trial under the provisions of the Seventh Amendment and Rule 59(a) of the Federal Rules of Civil Procedure. (Petition, p.10).

Blum instead relies on the fountainhead case of *Gasoline Products Company v. Champlin Refining Company,* 51 S.Ct. 513, 283 U.S. 494, 75 L.Ed. 1188 (1931) and its progeny. Hadra also relies upon *Gasoline Products* and its progeny as did the Court of Appeals for the Fifth Circuit below.

The cornerstone of the rule enunciated in *Gasoline Products* is:

> "Here we hold that, where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again."

The Court in *Gasoline Products* went on to say that the question is "whether the issue of damages is so distinct and independent of the others arising on the counterclaim, that it can be separately tried".

The *Gasoline Products* Court in delineating the test applicable to a re-trial of one issue created the touchstone of the rule; that is, a re-trial of only one issue alone is proper if it may be had *without injustice* when it said:

> "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial *of it alone may be had without injustice.*" (Citations omitted) (Emphasis added)

The Court went on to determine in *Gasoline Products* that the questions of damages and liability were so interwoven in that case that the submission of one issue alone would amount to the denial of a fair trial and ordered a re-trial on both damages and liability.

Every case since *Gasoline Products* including all those cited by Blum has reiterated the rule in substantially the terms set out above.

Every case cited and relied upon by Blum makes it clear that where a re-trial may be held *"without injustice"* that a new trial on the issue of damages alone is proper and permissible.

The cases are collected and synthesized by Professor Moore in Moore's Federal Practice, Second Edition, Volume 6A, paragraph 59.06, wherein he comments on the *Gasoline Products* case:

> "Thus where in order to determine the amount of damages in a breach of contract case it might be necessary for the jury to re-find the terms of the contract, or the date of its formation, or when it was breached, a partial re-trial may not be ordered. This was the situation in the *Gasoline Products* case . . ."

In the case at hand it clearly was not necessary for the second jury to re-find the terms of the contract or the date of its formation or when it was breached. The date of the formation of the contract was undisputed. (See Plaintiff's Exhibit 18, Tr. 46, 48, 49-53) The date upon which it was breached was also undisputed as that was the date the termination letter was delivered to Hadra by Blum's representative in Iran. (Plaintiff's Exhibit 21, Tr.305-306) The term of the contract as to when it was to end was decided by the jury in the first trial in a manner adverse to Hadra and *favorable to Blum* as the earliest possible date upon which it could have terminated. (See Answer to Interrogatory No. 4, Tr.633)

Professor Moore cites with approval the discussion by Chief Judge Leahey in *Yates v. Dann,* 11 FRD 386, as a proper elucidation of the rule which was succinctly decreed in *Gasoline Products.* Judge Leahey said, in what Professor Moore describes as an "excellent opinion" the following:

> "Under Federal Rules of Civil Procedure, Rule 59, . . . the trial judge has discretion to order a partial

> new trial as to one or more issues when it appears the issue in question is severable from and not interwoven with the remaining issues. The theory behind this rule is a party who has already had his day in court as to a particular issue may not have another opportunity to relitigate the same point unless the partial new trial will result in a miscarriage of justice."

The common thread which runs through all of the cases is the issue of whether or not the issues are separable. The overriding consideration, which has now become the fabric of the rule first enunciated in *Gasoline Products* and reiterated in all of the cases cited by Blum, is when a new trial may be had as to one issue *"without injustice"* and "without unfairness", then a new trial limited to the issue of damages is proper.[1]

Williams v. Slade 431 F.2d. 605 (5th Cir. 1970) which is heavily relied upon by Blum in its petition sets forth the test that when applied to the posture of this case must necessarily result in the denial of Blum's petition. In *Williams* the court quoted with approval the holding of *Geffen v. Winer* 244 F.2d 375 at 376 (D.C. Cir. 1957), that:

> "Here it appears from the record *as a whole* that interests of justice will be best served by a new trial on all issues . . ."

Williams states the rule which is applicable here as follows:

> "The common thread which runs through these decisions is that in each case the court thought that as a result of the *totality of the circumstances* that the issues sought to be excluded by a partial new trial had not been properly determined initially even though the

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1. Cases enunciating the same rule and permitting a new trial as to damages only, by way of example only, are: *Rosa v. City of Chester, Pennsylvania,* 278 F.2d. 876 (3rd Cir. 1960); *Gardner v. Vogel,* 237 F.Supp. 119 (D.C. Penn. 1964); *Indamer v. Crandon* 217 F.2d. 391 (5th Cir. 1954); and those cases collected in Moore's Federal Practice, Second Edition, Vol. 6A, paragraph 59.06.

obvious error complained of related to the other issue or issues." (Emphasis supplied)

Viewing this case from the totality of the circumstances, as did the trial judge and the Court of Appeals, it is clear that the jury verdict was not the result of a compromise verdict. Indeed, the jury was specifically instructed not to decide who they thought should win and then try to answer the questions in that light. (Tr.604) Here the issue of liability was not decided by the jury but was decided by the trial court on the basis of the jury's answers to interrogatories. Under Texas law if Hadra satisfactorily performed his obligations and duties under his agreement with Blum and he was not reassigned to Dallas, then Blum had breached its contract with Hadra as a matter of law. *Carl M. Hadra v. Herman Blum Consulting Engineers, Inc.*, 632 F.2d 1242 (5th Cir. 1980) at page A6 of Appendix A to the Petition.

Here, unlike the majority of the cases cited by Blum, we are dealing with an interrogatory verdict as opposed to a general verdict and with a contract case as opposed to a negligence case.

Both the trial court and the Fifth Circuit viewed the trial from the totality of the circumstances and determined that the issues were separable and in the exercise of their sound discretion that the re-trial of the damage issue only was *neither unjust nor unfair* to Blum.

Indeed, the Petitioner conceded in its brief in the Court of Appeals below that it was unlikely that any jury misconduct occurred. (Brief of Appellant in the 5th Circuit at page 23, and *Hadra v. Blum, supra,* at page A6 of Appendix A to the Petition)

CONCLUSION

Under the Seventh Amendment, the teaching of *Gasoline Products* and its progeny and under the factual posture of this case, both the trial and appellate courts below properly determined the issue in limiting the retrial granted by the trial court to the issue of damages.

Contrary to the contention of the Petitioner, the trial court and the Fifth Circuit Court of Appeals properly applied the doctrine of *Gasoline Products*. It is a question of fact committed to the discretion of the trial court as to whether the issues are separable and whether one issue could be retried without injustice.

There is no conflict among the circuits as to the rule of *Gasoline Products*. Inadequate damages do not constitute a compromise or jury malfunction requiring a re-trial of all issues as a matter of law as contended by Petitioner.

The Petitioner has asked this Court to substitute its judgment of the facts and discretion for that of both the trial and appellate courts below. It is respectfully submitted that such is not the function of a Petition for Certiorari and accordingly it is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Response to Petition for Writ of Certiorari have been served upon Mike A. Hatchell, Esq., P.O. Box 629, Tyler, Texas 75701 by placing the same in the United States mail, properly addressed and postage prepaid, on this the ..... day of March, 1981.